No. 84-690 (3)

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT PAUL GAGNON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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TABLE OF AUTHORITIES

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1. Respondents attempt to create the impression that, with the exception of respondent Gagnon, they had no "notice" of the conference between trial court, Gagnon's counsel, and the juror (Br. in Opp. 1, 18); that they were "unaware" of the conference (*id.* at 20); and that they were never "apprised" or "informed" of the conference (*id.* at 6 & n.5, 10). This interpretation of the events is simply incredible.

As the transcript shows (Pet. App. 18a-22a), the episode began when the trial judge informed all of the respondents and their counsel in open court, in the absence of the jury, that one of the jurors had noticed respondent Gagnon making sketches of the jurors. Respondent Gagnon's attorney, Robert Wolkin, requested the court (*id.* at 19a) to "direct some questions to that juror and find out whether the concern that is being expressed, whether it might be in the nature of prejudice against Mr. Gagnon." None of the

attorneys for the other respondents expressed any concern about the incident; the only question raised was about possible "prejudice against Mr. Gagnon."[1]

The trial judge immediately agreed with Wolkin's proposal and stated (Pet. App. 19a): "I will talk to the juror in my chambers, and make a determination. We'll stand at recess." The transcript then notes (*ibid.*): "(Thereupon, a brief recess was taken; and the following proceedings were held in chambers)." What additional notice could respondents have needed? Respondents lamely assert (Br. in Opp. 19) that "it would appear that no one * * * understood or heard the Court's final comment prior to the recess." Far more likely than that four trained lawyers and their clients all failed to hear or understand the court's clear announcement, however, is that respondents knew about, and voluntarily chose not to attend, the conference.

But even if respondents (other than Gagnon) were in fact unaware of precisely when the trial court's conference with the juror would take place, they could hardly have been unaware that the trial in fact resumed, with no change in the jury panel, following the "brief recess." That fact should have suggested to any reasonably diligent attorney that the matter of the juror's fitness to continue serving had been resolved. Moreover, respondents' reconstruction of the facts depends upon the assumption that Gagnon's attorney, Wolkin, did not communicate with his fellow defense counsel. However, throughout the trial, the defense attorneys

[1]The silence of the other respondents at this juncture underscores the weakness of their position that they were entitled to raise the issue of their absence from the conference on appeal under the "plain error" rule. Had Gagnon's attorney not requested that something further be done, there would have been no conference. Respondents plainly could not have raised the issue of juror bias on appeal without lodging a timely objection. They were no worse off by virtue of Wolkin's diligence, and should not be heard to complain of inadequacies in a proceeding which they did not request and in which they evinced no interest.

worked closely together; the objections of one attorney were treated for purposes of the trial as the objections of all defendants.[2] It is highly unlikely, to say the least, that the other respondents failed to learn of the conference from any of these sources.

This disposes, as well, of respondents' contention (Br. in Opp. 20) that "[s]ince all of the Respondents and their counsel, except for Gagnon's counsel, were unaware of the hearing they could not have objected or requested a copy of the transcript to review to determine whether they were satisfied." See also *id.* at 1 & n.2. Since respondents were informed in open court that the trial judge would (at respondent Gagnon's request) conduct the conference, and since they could not, in any event, have remained unaware of the conference under the circumstances, they had no justification for not raising an objection, if they had an objection, or for not requesting to see the transcript, if they deemed it worthwhile to do so.[3]

[2]In light of this practice, it is fair to say that Wolkin represented all of the respondents at the conference. Since he was the attorney (and his the client) most affected by the sketching incident, it was reasonable for the other respondents to rely upon him to represent the interests of all, and for the court to assume that this was the case. See Pet. 15.

[3]Respondents charge (Br. in Opp. 1) that our petition "misstates one of the facts" — namely, that transcripts of the in-chambers conference were available to respondents and their counsel during trial. However, as our petition indicates (at page 6), the authority for this statement is no less than the court of appeals' own statement of the facts of the case. See Pet. App. 5a. And respondents impliedly acknowledge (Br. in Opp. 20) that, if they knew of the conference — as they did — they were able to obtain a transcript. If they did not actually receive a copy of the transcript, it is solely because they chose not to request one, not because one was not available.

Respondents also claim (Br. in Opp. 1) that our statement of the case was "incomplete" because it did not refer to an affidavit by attorney Wolkin that was placed in the record by respondents. However, the affidavit contained no relevant information beyond that recited in the court of appeals' opinion; we therefore relied on the latter source.

2. Respondents' purported distinctions (Br. in Opp. 10-14) of the conflicting court of appeals decisions cited in our petition depend entirely on this attempted recasting of the facts.[4] Since the opinion does not depend at all on the "facts" hypothesized by respondents, the legal principles for which it stands remain in irreconcilable conflict with those applied elsewhere. And far from applying "well settled" principles of law, as respondents suggest (Br. in Opp. 5), the decision of the Ninth Circuit is a radical and unsettling departure from sound practice.

We draw the Court's attention to additional recent authority supporting our position that neither the Constitution nor Rule 43 requires the presence of the defendant at every conference in connection with the trial. *United States* v. *Pepe*, 747 F.2d 632 (11th Cir. 1984) (defendant's presence not required at *James* hearing on admissibility of co-conspirator's statements). *Pepe* also conflicts with the decision below on the question of prejudice, holding that the defendant was not prejudiced by his personal absence from the hearing since his attorney was present and conferred with him, transcripts were available, and the defendant did not suggest any additional questions that should have been posed.

3. None of respondents' arguments thus far discussed applies in any way to respondent Gagnon. Gagnon, through his counsel, unquestionably had notice of the conference; he was represented therein by his attorney, who expressly

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[4]An additional factor relied on by respondents to distinguish *United States* v. *Yonn*, 702 F.2d 1341 (11th Cir. 1983), was that no precautionary instructions were given to the jurors in this case (Br. in Opp. 11-12). However, the court certainly impressed upon the one juror directly involved the importance of impartiality (Pet. App. 20a-22a), and, with the concurrence of Gagnon's counsel, it was decided that the other jurors should not be informed of the incident (*id.* at 21a).

concurred with the results of the conference. The only argument addressed to Gagnon's case is found at Br. in Opp. 21:

> Further, Gagnon should not be treated separately from the remaining Respondents because his lawyer's presence was invited and his lawyer did participate. There are reasons for a defendant to be present, especially if their presence can assist his lawyer and add insight into whether the juror might not be able to be impartial. Minimally, the choice should be left to the defendant as to whether he wants to be present and not made by the court.

However, as our petition explains in detail (at 13-15), Gagnon's presence at the conference with the juror would have been useless or worse than useless. The very point of the conference was to determine whether the juror was intimidated by or biased against Gagnon. It is quite unlikely that the juror's candor during the in-chambers questioning would have been enhanced by Gagnon's personal presence. Our petition also demonstrates (at 18-20) that Gagnon's absence was, and should be considered to be, a voluntary, tactical decision made on, or with the availability of, advice of counsel. Gagnon knew about the conference, but did not attend (for excellent reasons). This would be considered a sufficient waiver in most of the courts of appeals. See Pet. 21-22.

But even if Gagnon's absence were deemed involuntary, the question for the court of appeals was whether he was prejudiced by his absence. Nothing in respondents' brief casts any doubt on our contention that he was not prejudiced in any way.

For these reasons and those stated in our petition, it is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

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Solicitor General

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